

SERVED: August 10, 2007

NTSB Order No. EA-5306

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 9<sup>th</sup> day of August, 2007

_____	)	
MARION C. BLAKEY,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-17696
v.	)	
	)	
AARON B. THIBERT,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

The Administrator appeals the oral initial decision of Administrative Law Judge William R. Mullins, issued on June 27, 2006.<sup>1</sup> By that decision, the law judge dismissed the Administrator's complaint, which had ordered a 120-day

<sup>1</sup> A copy of the initial decision, an excerpt from the hearing transcript, is attached.

suspension of respondent's commercial pilot and flight instructor certificates, based on alleged violations of 14 C.F.R. §§ 91.7(a)<sup>2</sup> and 91.13(a).<sup>3</sup> We deny the Administrator's appeal.

The Administrator's March 10, 2006 order functions as her complaint against respondent, and alleges that respondent was the pilot-in-command (PIC) of a Bell helicopter on May 12, 13, 16, and 17, 2005. The Administrator alleges that, on May 19, 2005, Versatile Helicopters, Inc. conducted an inspection of the helicopter at issue, and that the inspection revealed that the aircraft was not in an airworthy condition at the time that respondent operated the aircraft. In particular, the Administrator's complaint alleges that the aircraft had a broken lateral cyclic control servo mount bracket, a cork inserted in the engine oil quick drain in lieu of an approved part, and that the aircraft's records stated that the "rotor tach [was] running hot," but that no maintenance records indicating any repair of the rotor tachometer existed. The Administrator's complaint also alleges that, at the time of the inspection, the aircraft

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<sup>2</sup> Section 91.7(a) provides that, "no person may operate a civil aircraft unless it is in an airworthy condition."

<sup>3</sup> Section 91.13(a) provides that, "[n]o person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

had been in an unairworthy condition for approximately 2 weeks. Based on these allegations, the Administrator charged respondent with violating 14 C.F.R. §§ 91.7(a) and 91.13(a).

The law judge held an evidentiary hearing on June 27, 2006, at which the Administrator presented the testimony of Aviation Safety Inspectors Michael Boler and Jeffrey Jennings, both of whom hold airframe and powerplant certificates, and work in the Administrator's Flight Standards District Office in Oklahoma City, Oklahoma. Inspectors Boler and Jennings testified that they inspected the aircraft in question on May 19, 2005, and that they considered the helicopter to be in an unairworthy condition. Tr. at 10, 48-50. In particular, Inspectors Boler and Jennings both testified that a properly functioning tachometer is necessary for safe flight, and that the aircraft would not conform to its type certificate in the absence of a working tachometer. Tr. at 17, 48-49. In addition, Inspectors Boler and Jennings opined that a qualified pilot should have known that the alleged discrepancies existed, and should have ensured that a mechanic repaired the discrepancies before operating the aircraft. Tr. at 18, 51. On cross-examination, Inspectors Boler and Jennings testified that they did not review the aircraft's type certificate or any accompanying data regarding the aircraft's type design before determining that the

aircraft was unairworthy. Tr. at 28-29, 66. Inspectors Boler and Jennings also both testified that they did not ascertain whether respondent knew anything about the alleged discrepancies prior to operating the aircraft, and that they did not review the pre-flight inspection checklist that respondent used prior to operating the aircraft. Tr. at 25, 27, 59-60. Respondent also testified at the hearing, and stated that he would not normally inspect any of the alleged discrepancies during his pre-flight inspection, and that he was not aware of any discrepancies regarding the broken bracket or the cork inserted in the engine oil quick drain. Tr. at 76-78. With regard to the tachometer, respondent stated that, during a flight on May 13, 2005, the "tach generator" stopped working, and that a qualified airframe and powerplant mechanic repaired the component after respondent landed the aircraft. Tr. at 83-84. Respondent testified that he knew that the "tach" was fixed before he operated the aircraft again. Tr. at 85.

The law judge dismissed the Administrator's complaint, stating that no standard exists that requires operators to ensure that maintenance workers have properly documented their work on an aircraft. Tr. at 107. The law judge found that the evidence on the record also did not prove that any of the alleged discrepancies would render the aircraft unairworthy, and

that the Administrator had not proven that respondent operated the aircraft knowing that it was unairworthy. Tr. at 110-111. As a result of these conclusions, the law judge dismissed the Administrator's complaint.

On appeal, the Administrator argues that the law judge's conclusions are contrary to the facts established in the record, and are not consistent with Board precedent and policy. In particular, the Administrator alleges that respondent did not ensure that the aircraft's maintenance records were accurate, and that the lack of maintenance entries regarding the alleged discrepancies rendered the aircraft unairworthy. The Administrator also alleges that respondent knew or should have known that the aircraft was unairworthy before he operated it, because "more than just a cursory pre-flight" inspection would have revealed the discrepancy regarding the broken bracket. Administrator's Appeal Br. at 11. Respondent refutes each of the Administrator's arguments, and urges us to affirm the law judge's dismissal.

In reviewing the law judge's decision and considering the Administrator's appeal, we emphasize that the Administrator has the burden of proving that the aircraft was unairworthy by a preponderance of the evidence. Administrator v. Van Der Horst, NTSB Order No. EA-5179 at 3 (2005) (recognizing that the

Administrator has the burden to prove that an aircraft is not airworthy in order to prevail on her allegation that the respondent violated 14 C.F.R. § 91.7(a), and holding that the Administrator "did not prove this key fact"); see also Administrator v. Schwandt, NTSB Order No. EA-5226 at 2 (2006) (stating that it is the Board's role "to determine, reviewing the evidence [the Administrator] presents, whether she has met her burden of proof").

In cases in which the Administrator alleges that an operator has violated 14 C.F.R. § 91.7, we have long held that the standard for airworthiness consists of two prongs: (1) whether the aircraft conforms to its type certificate and applicable Airworthiness Directives; and (2) whether the aircraft is in a condition for safe operation. Administrator v. Doppes, 5 NTSB 50, 52 n.6 (1985) (citing 49 U.S.C. § 1423(c)); see also Administrator v. Anderson, NTSB Order No. EA-3976 at 2 (1993); Administrator v. Nielsen, NTSB Order No. EA-3755 at 4 (1992); Administrator v. Copsey, NTSB Order No. EA-3448 (1991). We have recognized that, "the term 'airworthiness' is not synonymous with flyability." Doppes, supra, at 52 n.6. We have also concluded, however, that when small, insignificant deviations are present, an aircraft may still substantially conform to its type design. Administrator v. Frost, NTSB Order

No. EA-4680 (1998); Administrator v. Calavaero, Inc., 5 NTSB 1099, 1101 (1986).<sup>4</sup> In determining whether an aircraft is airworthy in accordance with the aforementioned standard, the Board considers whether the operator knew or should have known of any deviation of the aircraft's conformance with its type certificate. See, e.g., Administrator v. Yialamas, NTSB Order No. EA-5111 (2004); Administrator v. Bernstein, NTSB Order No. EA-4120 at 5 (1994).

The Administrator's principal argument for finding that respondent violated 14 C.F.R. § 91.7(a), and, as a result, § 91.13(a), is based on the notions that respondent should have reviewed and confirmed the accuracy of the items in the maintenance logbooks and records prior to operating the aircraft, and that, in any event, respondent should have known that the alleged discrepancies existed and rendered the aircraft unairworthy. Given that the Administrator has the burden to prove the regulatory violations she charges, and the aforementioned two-prong standard for airworthiness, the Administrator must prove that the aircraft either did not conform to its type certificate or was not in a condition for

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<sup>4</sup> Previous Board cases have implied that manuals governing an aircraft's maintenance and flight protocol are also principal components in discerning the aircraft's FAA-approved type design. See Frost, supra, at 1 n.3.

safe operation, in order to prevail. The Administrator has not met her burden in this case. The Administrator has not provided the aircraft's type certificate, type certificate data sheet, or any maintenance manuals or relevant directives for the Board's review. Moreover, the Administrator's inspectors, in investigating these alleged violations, stated that they did not review the type certificate or other such items in determining the airworthiness of the aircraft.

With regard to the second prong of the two-part airworthiness standard, the Administrator presented the testimony of Inspectors Boler and Jennings, who testified that they believed the alleged discrepancies resulted in the aircraft not being in a condition for safe operation. Assuming, arguendo, that these discrepancies would render the aircraft in an unsafe condition, the Administrator still must prove that respondent either knew or should have known of the discrepancies prior to operating the aircraft. Yialamas, supra, at 3. The Administrator argues that respondent should have discovered the discrepancies during his pre-flight inspection of the aircraft. We do not agree with the Administrator's argument on this point. First, the law judge determined that the Administrator had not proven that respondent actually knew about the discrepancies; the law judge primarily based this determination on credibility



and the weight of the evidence. See Tr. at 108 (finding that the mechanic who oversaw the maintenance on the aircraft and owned the repair shop had not informed respondent of the discrepancies). With regard to whether respondent *should have known* of the discrepancies, we also agree with the law judge's assessment. On this point, the law judge found that respondent acted reasonably in relying on the many flight students whom he was teaching to operate the aircraft during the pre-flight inspections, because the students were mechanics who had airframe and powerplant ratings, and no one noticed any discrepancies. Tr. at 108-109. Therefore, the Administrator has not proven by a preponderance of the evidence that the aircraft did not conform to its type certificate, or that respondent knew or should have known that the aircraft was not in a condition for safe operation.

The Administrator's appeal also attempts to persuade us to affirm her order because respondent did not ensure that accurate, complete maintenance records accompanied the aircraft. The Administrator cites case law emphasizing the importance of keeping accurate maintenance records, and we do not disturb the findings or rules in such cases. In the case at hand, however, we are not prepared to review the issue of whether respondent did not maintain accurate maintenance records or logbooks,

because the Administrator did not charge such a violation in her order, which later became her complaint, in accordance with our Rules of Practice, at 49 C.F.R. § 821.31(a).<sup>5</sup> Moreover, the Administrator has not established a nexus between a repair facility's failure to include maintenance repairs and activities in the appropriate records and an operator's violation of § 91.7(a). Overall, the Administrator has not met her burden of establishing that the aircraft in question either did not conform to its type certificate or was not in a condition for safe operation. Without satisfying at least one of these prongs, the Administrator cannot prevail.

Overall, we affirm the law judge's decision, and find that the Administrator failed to meet her burden of proving a violation of 14 C.F.R. §§ 91.7 and 91.13(a).

**ACCORDINGLY, IT IS ORDERED THAT:**

The Administrator's appeal is denied.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

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<sup>5</sup> We note that the Administrator's appeal brief indicates that the Administrator sought to charge respondent with a violation of 14 C.F.R. § 91.405, but concedes that she has waived the opportunity for this charge, given that the allegation was untimely. Administrator's Appeal Br. at 8. Section 91.405 requires owners and operators to ensure that maintenance personnel make appropriate entries in aircraft maintenance records.